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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ALBERT LAMONT HECTOR, Defendants.	Case No. CR 04-00860 DDP **ORDER GRANTING NEW TRIAL** [Motion filed on March 3, 2008]

This matter comes before the Court upon Defendant's motion to dismiss the indictment for outrageous government conduct or, in the alternative, for a new trial. After reviewing the materials submitted by the parties and considering the arguments therein, the Court GRANTS Defendant Hector a new trial.

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I. Findings of Fact

A. Procedural History

On July 9, 2004, a grand jury in the Central District of California returned an indictment charging Defendant Albert Lamont Hector with possession with intent to distribute cocaine base (21 U.S.C. § 841), possession of a firearm in furtherance of drug trafficking (18 U.S.C. § 924(c)), and being a felon in possession of a firearm and ammunition (18 U.S.C. § 922(g)(1)). The charges arose from the execution of a search warrant at Mr. Hector's residence on June 2, 2004, where Los Angeles Police Department ("LAPD") officers found 6.46 grams of cocaine base, $4,361 cash, a loaded .45 caliber Glock semi-automatic pistol, and a magazine containing live ammunition. At the time the warrant was executed, Defendant was the only person in the apartment, and was arrested.

At Mr. Hector's first trial, which commenced on December 7, 2004, the Government relied wholly on circumstantial evidence in its case in chief: the cocaine, firearm, ammunition, and money that were found during the search. The defense called Officer Michael Fletcher, the LAPD lead officer on the case, as an adverse witness, to testify that 1) the police did not find many of the items that one would typically find in a drug dealer's apartment; 2) Mr. Hector had time to dispose of the cocaine base but did not; and 3) Officer Fletcher had no personal knowledge that Mr. Hector was dealing drugs out of the apartment.

This Court had no choice but to declare a mistrial after Officer Fletcher essentially blurted, during the Government's

examination, that a controlled buy had occurred at Mr. Hector's house earlier that day. It is undisputed that Officer Fletcher did not witness the alleged buy, and the Government had not introduced evidence of the buy in its case in chief.

Prior to retrial, Mr. Hector moved to dismiss the indictment on double jeopardy grounds, arguing that Officer Fletcher had intentionally provoked a mistrial. In the alternative, Mr. Hector moved to preclude the Government from introducing evidence at a retrial that it had chosen not to introduce at the first trial. The motion was denied in its entirety. At the retrial, the Government altered its trial strategy and presented evidence of the buy referenced by Officer Fletcher in the first trial. The Government's evidence of the buy came in primarily through the testimony of a paid confidential informant ("informant").

Mr. Hector denied knowledge of drug sales at the apartment. He explained that the cash belonged to his friend, Jordan Berhe; Ms. Berhe, who testified that she owned the neighborhood market and had been robbed once making a deposit alone, corroborated this explanation. Mr. Hector and his apartment manager both testified that he had a roommate – also an African American male, around the same age, height, and built – who had not been seen since the night in question. Nevertheless, the informant identified Mr. Hector as the person from whom he had purchased drugs. Mr. Hector was convicted.

Post-trial, this Court granted a motion for judgment of acquittal as to Count 2 of the indictment. In addition, the Court granted a motion to suppress evidence based on illegalities during the execution of the warrant; as a result of the suppression, all

the convictions were necessarily vacated. Then, relying on a change in the law set forth in an intervening decision by the United States Supreme Court, the Ninth Circuit Court of Appeals subsequently reversed these orders. See United States v. Hector, 474 F.3d 1150 (9th Cir. 2007). Mr. Hector now brings a motion to dismiss the indictment, or, in the alternative, a new trial. This motion is founded in Mr. Hector's allegations that the Government committed outrageous misconduct by failing to discover and disclose impeachment information regarding the informant.

B. Defense Requests and Court Orders Regarding Informant and Police Witness Information

On July 24, 2004, two days after Mr. Hector was arraigned, counsel for the Government called defense counsel Davina Chen asking if Ms. Chen wanted discovery, whether she would be ready for trial on August 31, 2004, and whether Mr. Hector wanted to plead guilty. (Chen Decl. ¶ 3.) That same day, Ms. Chen sent a written discovery request. That request explicitly asked for discovery including, but not limited to "records of any 'controlled buy' that was the basis for the search warrant in this case," the name and address of "any confidential informant," and impeachment material on any government witness "whether or not they will be called at trial." (Mot. to Dismiss, Ex. A.) On July 26, 2004, the Government sent defense counsel 66 pages of discovery via a form letter, but did not respond to any specific discovery request. (Chen Decl. ¶ 5.) Ms. Chen then made two subsequent, increasingly specific written requests for discovery, again including but not limited to information related to the confidential informants. (Mot. To Dismiss, Ex. B, C.) Defense counsel also called

government counsel regarding the discovery requests. Although the Government "repeatedly advised . . . that [government counsel] and/or the case agent were 'looking into' [the] requests, [government counsel] did not actually produce anything." (Chen Decl. ¶ 6.)

On September 1, 2004, Defendant filed a motion to compel discovery. On September 3, the Government sent additional discovery, including the rap sheet of the informant with all identifying information (including nine names/aliases) except for the case numbers redacted. The Government also filed a "Notice of Non-Opposition" to Defendant's discovery motion, in which it advised the Court that the Government was "in the process of responding" to the requests. (Id. Ex. E.) Defendant filed a reply advising the Court that, although it claimed to be "in the process," the Government had not actually responded to multiple specific discovery requests. (Id. Ex. F.)

On September 13, 2004, the Court held a hearing on Defendant's discovery motion. At the hearing, defense counsel expressed her concern that even though

> the case law is clear [that the Government] is under the obligation to make herself aware of any impeachment or exculpatory information that is in its hands or is known to anyone working on the Government's behalf[, i]t doesn't appear to me that [government counsel] has been inquiring specifically as to these items. The reason I say it doesn't appear to me, I asked for discovery, and the responses are – they tend to be vague. 'I am not aware of that.'

(Id. Ex. G, at 80.) The Court then emphasized to the government counsel that she would have to make

> a representation as an officer of the Court that she has exercised due diligence, that she has made all of the inquiries that she is obligated to do, that she has made

> those inquiries in a diligent and direct manner and that there simply aren't those things, but Miss Chen is right, your obligation extends to make inquiries, and those inquiries have to be significant. Do you understand that?
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> **THE GOVERNMENT**: Yes, your honor. We have produced the rap sheet of the informant.
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> **THE COURT**: That is not the issue. The first issue, just so we take it in order –
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> **THE GOVERNMENT**: Yes, your honor.
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> **THE COURT**: The issue is the sufficiency of your inquiries. That is very important. Okay. So can you represent now what you have done in that regard or in light of this discussion do you want to think about it and inquire further?

(Id. Ex. G, at 80-81.)

Government counsel then again expressed that she had produced the rap sheet of the informant, and then said "I am not sure what else the defense has in mind." (Id. Ex. G, at 81.) Defense counsel explained that she wanted information regarding benefits received by the informant, any history of dishonesty, and anything else that would bear on the witness's credibility. (Id. at 82.) The Court explained to the Government that "you have to inquire of those specific items, if people are testifying as informants, anything they might have received." (Id.) The Government responded "We will get that for her, your honor." (Id.)

In addition, the question of disclosure of the informant's identity was discussed. (Id. at 84-90.) In a closed hearing, the Government advised the Court that the informant's identity needed to remain secret for his protection; the Court ordered disclosure by September 21, 2004, noting that trial was rapidly approaching, and that the defense was "entitled to know the identity of [the informant] at some point." (Id. at 89.)

Accordingly, the Court makes the following findings:

A. The Court finds that defense counsel explicitly requested on several occasions all information regarding identity of and benefits received by the informant, and any other information bearing on credibility.

B. The Court further finds that it explicitly reminded the Government that it had to make "significant" inquiries in order to obtain this information, and that the Government expressed that it understood its obligations.

C. Government Disclosures

On September 21, 2004, the Government informed defense counsel that the informant's name was Steven Taylor. (Chen Decl. ¶ 12.) Defense counsel questioned the veracity of this information because she had learned through an independent investigation that Steven Taylor was **not** the informant's name. His name was Steven A.[1] (Id.) The Government also provided redacted payment information for the informant for the year 2004, and made the following express affirmative representation: **"There is no impeachment information for the informant who will be testifying, other than what has already been provided to you."** (Mot. To Dismiss, Ex. H. (emphasis added).)

The Government also represented that "[w]e are not aware of any impeachment information for the police officers who may be testifying. I use the word 'aware' because we do not have possession, custody, or control over the disciplinary files of the police officers." (Id.)

[1] Although the informant already testified at trial, the Court has redacted his full name in an abundance of caution.

The Government does not contend that it made any inquiries or performed any investigation between September 13 and September 21, other than receiving the payment information regarding the informant that the LAPD affirmatively offered, in order to reach the conclusion that there was no available impeachment material regarding the informant. The Government does not contend that it made **any** inquiries whatsoever in order to reach the conclusion that there was no impeachment available regarding the police officer witnesses. Therefore, the Court finds that, in clear violation of the Court's directives at the September 13 hearing, the Government represented a lack of impeachment material without making the "diligent and direct" inquiries necessary to make that representation. (Id. Ex. G, at 81.)

After receiving the Government's assurance that there was no further impeachment, defense counsel nonetheless continued to request discovery of impeachment material and to remind the Government that it had a continuing obligation to discover and disclose exculpatory evidence, including impeachment material, under Brady v. Maryland, 373 U.S. 83 (1963). (See Mot. To Dismiss, Ex. I, J.) In one letter, dated November 22, 2004, defense counsel specifically requested answers to the following questions:

- Did [the informant] just begin informing in 2004 – if not, please provide complete discovery of payment sheets.
- Has he received any assistance other than cash, for example, help with cases, etc?
- How much will he receive for his court testimony in this case? Is the agreement in writing or is it oral?
- Has he previously testified in any other cases? If so, what are the names of these cases?
- Do you or the LAPD have any information that he has ever been unreliable?
- Does he have any substance abuse, medical, or other

problems that would bear on his testimony?

(Id. Ex. I.)

In response, the Government represented:

> Here are the answers to the questions in your letter dated November 22, 2004:
> (1) Yes, the informant began informing in 2004.
> (2) He has not received any assistance other than cash.
> (3) He receives a flat $90 fee for cases in which he will testify. This agreement is oral.
> (4) He has not previously testified.
> (5) Neither the Government nor LAPD have any information that he has been unreliable.
> (6) He has no substance abuse, medical, or other problems bearing on his testimony.

(Id. Ex. K.)

Although the record does not reflect the basis for the Government's answers, it does reflect that the answers were largely false. The informant had been informing off and on since the 1970s; he had previously received police assistance other than cash; he was a cocaine addict, was blind in one eye, and had glaucoma in the other.

The Government made no additional disclosures related to the informant prior to the first trial. After the first trial ended in a mistrial, the Government faxed defense counsel a letter advising that the informant had "worked once as an informant for the California Highway Patrol, in a murder-for-hire case with the Culver City Police." (Id. Ex. L.) The letter asserts that "[a]lthough he showed up for court, he was not called to testify" and that "he has not worked as an informant with anyone other than LAPD, aside from this 1998 case." (Id.) The following day – **the day after** the first trial ended in a mistrial - the Government called defense counsel and informed her that the informant "also goes by Steven A." (Chen Decl. ¶ 19.) The Government then filed a

Notice of Intent to introduce at the retrial evidence of the buy the informant claimed to have conducted.

The Court finds that by this point the Government already had to correct several pieces of misinformation about the informant; to wit, the Government had corrected his name because the initial name provided proved to be an alibi, and discovered that his history as an informant in fact began years earlier than 2004. The Government therefore had every reason to be on notice that the informant might have credibility problems, and to investigate further. As the Court noted at the December 13, 2004 hearing: "If somebody is using other assumed names, that calls into question their credibility sort of ab initio; doesn't it?" (Mot. To Dismiss, Ex. O at 142.)

D. Defense Investigation

1. Informant

During the pretrial period, defense investigation was ongoing. When the Government produced the informant's rap sheet on September 1, 2004, it - perhaps inadvertently - did not redact the case numbers related to the informant's prior arrests and convictions. By obtaining these records, defense counsel learned the informant's identity (Steven A) as well as details regarding his background that the Government had not disclosed, including that he was a drug addict who committed crimes to support his habit, and that he was blind in one eye and had glaucoma in the other. (Chen Decl. ¶ 22.)

Defense counsel learned that the informant had provided information to the authorities in efforts to obtain favors and leniency as early as the 1970s and that by 1984 he was considered by the West Los Angeles Police to be a "reliable snitch." (Id. ¶ 23.) By obtaining his driving record, defense counsel learned

that, despite his claims to be able to obtain employment driving trucks, the informant had not possessed a driver's license since 1984; by obtaining records of his attempts to obtain a driver's license, defense counsel learned that informant had lied on his Department of Motor Vehicles ("DMV") application forms, for example by applying for a "duplicate license" and stating falsely that he currently had an unexpired license. (Id. ¶ 24.)

Specifically, on December 11, 2004, after the Government advised that the informant would be testifying in the retrial, defense counsel and a defense investigator found and interviewed the informant. They located him at the Weingart Center, a homeless and drug rehabilitation center in Los Angeles's skid row. (Id. ¶¶ 26-29.) They advised him who they were, and he agreed to speak. When defense counsel asked him about his work as an informant, he explained: "That's what I do." When she asked him what that meant, he explained that he had been doing it for a long time. Throughout the interview, he repeated that informing was "what he did." At one point, he said "a rat is a rat." When defense counsel asked who else he had informed for, he said "lots of people." When she asked for specifics, he advised that he had first informed for the West LAPD in the 1970s. He explained that he avoided prosecution by informing on people. (Id. ¶ 26.)

The informant told defense counsel that he had also informed for the Culver City Police Department and the California Highway Patrol in Riverside in 1998 in a murder-for-hire case. (Id. ¶ 27.) The informant claimed he had received $10,000 to hire a hit man to kill someone, and that he immediately used $6,000 to buy drugs. The informant stated that he received an additional $10,000 after

claiming that he had not yet found a suitable hit man. The informant went to the police, was violated on his parole, and went to prison. Upon his release, the Culver City police department picked him up and gave him $400-500 for expenses.

Contrary to the Government's representation that the informant showed up for court but was not required to testify, the informant told defense counsel that the murder-for-hire case never got filed. (Id.) This discrepancy is important for two reasons: First, that the case was never filed suggests that the informant's information may not be considered reliable; the Government's characterization (that he was not needed to testify), suggests there was enough evidence for a successful case without the informant. The former serves, needless to say, as much more powerful impeachment evidence. Second, whether or not the case was in fact filed is objectively verifiable information. The Government either did not attempt to corroborate the informant's representations, or intentionally relayed them inaccurately to defense counsel. Neither is acceptable.

The informant further told defense counsel that he was blind in his right eye and had glaucoma in his left. (Id. ¶ 29.) He claimed to have a Class A drivers license that had just expired, but, as noted, defense counsel's research with the DMV revealed this representation to be false. That afternoon, defense counsel faxed a letter and the informant's DMV driving record to the Government advising that the informant might testify that he had a Class A drivers license, that the testimony would be false, and asking the Government to take steps to ensure that the informant did not commit perjury. (Mot. To Dismiss, Ex. N.)

Based on the discrepancy between the undisputed facts about the informant and the Government's representations (no health or drug condition, history of informing began in 2004, no record of unreliability), the Court can only conclude that the Government either failed to conduct a reasonable investigation, or misled defense counsel and the Court. Obviously, because such behavior undermines the integrity of the judicial process, neither is acceptable.

2. Officer Fletcher

Concurrent with the Government's representation that it was not "aware" of any impeachment information relating to the police officer witnesses, defense counsel undertook her own investigation as well. Although the Officer Fletcher situation is not the focus of the suppressed impeachment material in this motion, the Government's conduct with respect to investigating Fletcher underscores the Court's concern that there may be yet more undisclosed exculpatory or impeachment material.

Defense counsel subpoenaed the LAPD discipline records for a number of involved officers. From the City Attorney's office, defense counsel learned that the United States Attorney's Office had not made any requests related to this case. (Chen Decl. ¶ 40.) The Government does not contest this assertion.

Therefore, the Court finds that the Government represented that it had no impeachment material regarding the involved officers without ever making any inquiries.

The City Attorney's office provided officer records to both defense and government counsel on or about October 13, 2004. (Id.) These records included a sustained complaint against Officer

Fletcher for submitting an arrest report that he knew contained inaccurate information. Yet, two months later the Government filed a motion in limine to exclude evidence of complaints filed against the LAPD officers on the ground that, inter alia, it was unaware of any sustained complaints that would impact the officers' credibility. The Government acknowledges that it "must have had the documents at the time" it filed the motion, (Tr. Hearing Apr. 28, 2008, at 30:13-14), so the Court can only conclude that either the Government failed to read the disciplinary reports provided by the City Attorney or that it deliberately misrepresented their contents. Again, either reason is unacceptable.

Officer Fletcher, of course, proved to be an unreliable witness. The Court suppressed several of Mr. Hector's alleged statements on the day of his arrest after Officer Fletcher admitted that he had lied in his declaration about what questions he asked Mr. Hector. Officer Fletcher precipitated a mistrial after testifying about a drug buy about which he had no personal knowledge and of which no evidence had been introduced at trial. Perhaps most importantly, the Government cited Officer Fletcher as the primary source for its information from the LAPD about the informant. (Mot. To Dismiss, Ex. O at 127.)[2]

[2] In response to the Court's questioning about who in the LAPD had provided the information about the informant (which, as noted, turned out to be both false and incomplete), the Government responded: "It may have been Officer Fletcher, but I don't remember who it was." (Id.) Accordingly, either the Government relied on a witness whose credibility it failed to investigate, and who proved to have a record of unreliability, or else it relied on unnamed LAPD sources who it could not recall. The former bespeaks recklessness in relying on an unvetted source, the latter bespeaks recklessness for completely failing to track the source of information and thus rendering corroboration impossible.

The point is this: Although ultimately Officer Fletcher's unreliability was revealed before trial, it might not have been. As far as the Court can discern, the Government made no effort to investigate the reliability of its primary investigative officer, and even when, due to the diligence of defense counsel's investigation, the Government did receive crucial impeachment evidence, it either failed to identify it or affirmatively misrepresented that the evidence did not exist. This chain of events, in connection with the facts surrounding the investigation of the informant, has convinced the Court that the Government failed to conduct any meaningful investigation for impeachment/exculpatory discovery. This failure was reckless because, among other things, it ignored direct orders by this Court to investigate further. The Court is fully willing to believe that Government counsel's performance is due to inexperience rather than improper motive, but the Court is nevertheless left seriously concerned that yet more important impeachment or exculpatory material in this case may remain undisclosed.

E. Government Response to Defense Discoveries

The Monday after defense counsel interviewed the informant, the Court held a hearing on Defendant's motion to dismiss the indictment. At the hearing, the Government accused defense counsel of witness tampering: "We have just learned information this afternoon indicating that we believe the defense has made attempts to prevent [the informant] from testifying." (Mot. To Dismiss, Ex. O, at 113.) The Government claimed that defense counsel went to the informant's residence and in the presence of others pointed him out from a distance and said "something to the

effect of, 'why are you testifying against my client?' 'Why are you working for the Government? Don't you know you can get killed?'" (Id. at 114.) The Government acknowledged that this information came from the informant himself, reported that it was going to move informant "out of his residence . . . [as] a result of defense counsel's actions" because of safety concerns, and then sought a ruling that Defendant be precluded from eliciting this fact at trial because it was a "burden" rather than a "benefit" for the informant. (Id. at 114-16.)

When defense counsel advised the Court that she had not discouraged the informant from testifying, but that her interview with the informant had uncovered substantial undisclosed impeachment, the Government responded that it had no obligation to disclose what it had not discovered because "there is no Brady violation where the information is not in the federal government's hands," and in any case there was no prejudice because the defense had discovered the information on its own. (Id. at 138.)

Defense counsel emphasized that given the discrepancies between what it learned and what the Government disclosed, she remained

> so uncertain as to whether or not I received everything. I received a lot now because my investigative staff has been driving all over the state of California getting information for me, and they took their Saturday to go out and interview the witness with me because I didn't feel comfortable doing that by myself, but this is the information that I have been asking from [the Government] for – I think my first letter was in July. Your honor, [the informant] also affirmatively misrepresented things to us. He told us he has a class A driver's license to drive big rigs.
>
> I had earlier learned that he was unable to get a driver's license because he couldn't pass vision tests because he is blind in one eye and has glaucoma in the other.
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> When he told me he had a class A, I had my investigator call DMV again because I didn't want to try and impeach an

> informant with information that I was not sure about, so my investigator called DMV again and confirmed that he has no driver's license.
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> This person is not reliable, your honor.
>
> Perhaps we should have him in court, and he can make the allegations against me. I think it was against me and not my investigator, but at this point I am very concerned that we are going to go to trial, and all I have is what I learned.
>
> I don't know what other Brady there is out there that he didn't just openly share with me on that day.

(Id. at 131-32. (emphasis added).)

The Court, too, was concerned about the Government's representations by this point: "I am uncomfortable about the Brady issue at this point just based upon what I have heard." (Id. at 131.) It further reminded the Government: "You have more than an obligation to simply learn things third-hand. You have to – if you are dealing with an informant, you have an obligation to affirmatively find out information that relates to that informant that you can reasonably acquire." (Id., Ex. O, at 125-26.)

The Court thus finds that by the beginning of the second trial, the informant's potential reliability problems were well established, and the Government had been on explicit and repeated notice for several months that its method of investigating and discovering impeachment evidence to disclose was unsatisfactory; there was a "big disconnect" between the truth about the Government's witnesses and what the Government had turned over. (Id. at 125.)

F. Impeachment at Trial

At the retrial, the Government called the informant to testify that he had observed Mr. Hector's involvement with the alleged buy. The informant was the only direct evidence linking Mr. Hector to drug sales. No witness observed the informant conduct the alleged

buy. The Court finds that the following impeachment information regarding the informant was elicited at trial, either by defense counsel or by the prosecution:

- The informant admitted he is blind in one eye and has glaucoma in the other. (Id., Ex. P, at 169 (by the prosecution).)
- The informant admitted he is a former cocaine user. (Id. at 181-82 (by the prosecution).)
- The informant received witness fees of $200 in this case, and was relocated to a hotel. (Id. at 183-84 (by the prosecution).)
- The informant admitted to "first" informing "for the police" in the 1970s. (Id. at 185 (by the defense).)
- The informant admitted to being arrested "plenty times" [sic], including for a burglary, to informing to the police to help his cause, and to going to prison. (Id. at 185-92 (by the defense).)
- The informant admitted to being an informant in a 1998 murder-for-hire case, and to using a portion of the $20,000 he received to buy drugs. (Id. at 195-99 (by the defense).)
- The informant acknowledged that the man he claimed had hired him to commit the murder never went to prison. (Id. at 201 (by the defense).)
- The informant admitted to driving without a license, and to applying for a duplicate driver's license even though he did not have a current valid one. (Id. at 205-09 (by the defense).)

- The informant claimed that defense counsel's interview of him placed him at risk, but then admitted that he was not "intimidated" physically, and that the Government's relocation of him was only for five nights. (Id. at 221-22 (by the defense).)
- The informant admitted that he had "told lies in the past" to get benefits, but this admission was general and not directed at any particular instances. (Id. at 250 (by the defense); see also id. at 244 (by the prosecution).)

G. Post-Trial Discoveries

The Court finds that the following impeachment material was disclosed post-trial:

Defense counsel obtained the informant's California Department of Corrections ("DOC") file. Pre-trial, the Government had produced a highly redacted rap sheet, which indicated that the informant had been convicted of multiple burglaries, multiple controlled substance offenses, a robbery, and a number of misdemeanors, and had sustained numerous parole violations. The Government did not produce any conviction documents, criminal complaints, or arrest reports. Defense counsel was not able to obtain the DOC file in time for trial, despite a subpoena ordered returnable on December 14, 2004, the first day of the second trial. However, the DOC file, once obtained, revealed

> substantial impeachment information, including innumerable reports for violations of prison rules and parole; housing classification documents indicating that the informant was placed in administrative segregation as early as 1986 (having been received by CDC in 1985) for what appears to be his reputation as an informant; later documents from the 1990s indicating that the informant was segregated for having

> "enemies" and a "snitch-jacket"; and other chronological reports indicate that the informant was manipulative with and abused his relations with prison staff. One report indicates the following: "Inmate . . . is endeavoring to establish over-familiarity with staff. He is in the process of trying to guess this writer's first name and continues to call me 'Harvey' or 'Marv' and refers to himself as 'dad.' [He] will become very disrespectful and verbally abusive when his requests are denied and **will challenge staff to write reports on him saying that he will beat them by lying**. [He] feels that he has a buddy-buddy type relationship and would like to work the same to his advantage.

(Chen Decl. ¶ 38 (emphasis added).) In addition, in February 2008 defense counsel spoke with Lieutenant Chris Gutierrez of the Culver City Police Department, who remembered Steven A. and "recognized him as a sophisticated criminal informant, who knew how to 'play both sides' and to manipulate the police." (Id. ¶ 39.) Moreover, Lieutenant Gutierrez stated that none of the informant's information "ever led to any prosecution because there was 'not enough information to prosecute.'" (Id.)

Further, the Government revealed several additional relevant facts during this motion briefing. For example, the Government reveals that the informant was arrested on June 14, 2006 for carjacking and was sentenced to 14 years imprisonment. (Id.) From this file, defense counsel accessed a police interview in which the informant offers to testify in another case in exchange for a deal and explains to the police officer:

> When I go to court it will be a whole different story there again, man, you know, if I get passed that thing. So you know, if I – you believe right here, knowing I'm going to court, and I know what I had with [inaudible] didn't work, so I would probably change it up again, you know.

(Reply, Ex. S., at 306.)

From reading the transcript of a hearing related to that case, defense counsel also discovered that the LAPD had told the Los

Angeles district attorney's office that the informant had done "numerous undercover buys over a three-or-four year period, and the last time that he had worked for the police was a year and a half or two years ago." (Id., Ex. T, at 332.) As the referenced hearing took place in 2006, a portion of the three-to-four year period necessarily predated 2004. The Government now acknowledges that LAPD records document the use of this informant as far back as 1984. (Gv't Surreply.) Accordingly, the evidence now shows that not only was the Government's contention that the informant began informing in 2004 wrong, but LAPD's own records prove that point.

F. Summary

The following two tables summarize the path of disclosure and investigation of impeachment material with respect to the informant and Officer Fletcher, and are helpful in comparing the Government representations with defense counsel's independent discoveries, and the impeachment that defense counsel was able to use at trial with material disclosed only after the fact. The first table compares the Government's representations with the truth. The second compares the impeachment that came out at trial with the evidence discovered post-trial.

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Table 1:

Issue	What Government Represented Before 1st Trial	What Government Represented Between 1st and 2nd Trial	Truth
Identifying Information about Informant	· 9/01/04: Provided the rap sheet with all identifying information redacted. · 9/21/04: Told Defense Counsel Informant's Name was Steven Taylor.	· Two days after mistrial, represented that informant "also goes by Steven A."	· Informant's name is actually Steven A.
Impeachment Information about Informant	· 9/21/04: Provided Payment info for 2004. · 9/21/04: "There is no impeachment information for the informant who will be testifying, other than what has already been provided to you." · 11/04: In response to specific defense questions, represented that informant began informing in 2004, has not received any assistance other than cash, receives a $90 flat fee for cases in which he will testify, has not previously	· Represented that informant had actually worked once in 1998 as an informant for the California Highway Patrol, in a murder-for-hire care with the Culver City Police. Although he showed up for court, he was not called to testify.	· Informant had been a long time drug addict who committed crimes to support his habit. · Informant was blind in one eye and had glaucoma in the other, and had lied about having a Class A drivers license. · Informant had been informing for money and favors since the 1970s. · The 1998 murder-for-hire case was never prosecuted because the police did not gain enough

	testified, there is no information that he has ever been unreliable, and he has no substance abuse, medical, or other problems bearing on his testimony.		evidence to prosecute, suggesting informant's lack of reliability. In fact, informant's information **never** led to a Culver City policy prosecution. · Post-trial, defense counsel obtained informant's DOC records, which showed him to be a known liar seeking to manipulate the system. · Post-trial: Informant was arrested for carjacking in 2006 and during a police interview related to that case offered to lie on the witness stand in exchange for a positive deal in his carjacking case.
Impeachment Information about Police Witnesses	· 9/21/04: "We are not aware of any impeachment information for the police officers who may be testifying. I	· No change	· LAPD records obtained by defense counsel from the City Attorney office revealed a sustained

	use the word 'aware' because we do not have possession, custody, or control over the disciplinary files of the police officers." · Filed a motion in limine to exclude evidence of complaints against officers, stating it was unaware of any relevant sustained complaints, even though the sustained complaint against Officer Fletcher was in the Government's possession.		complaint against Officer Fletcher for submitting an arrest report that he knew contained inaccurate information.

Table 2:

Impeachment Available at Trial	Impeachment Revealed Only After 2nd Trial
· Informant was blind in one eye and had glaucoma in the other · Informant was a former cocaine user · Informant received $200 for his testimony and was relocated to hotel pre-trial · Informant had been informing since the 1970s. · Informant had been arrested "plenty" of times. · Informant informed in a 1998 murder-for-hire case, but as	· Informant's DOC file revealed that he frequently violated prison rules, that he was segregated for being a snitch, that he was manipulative with his relations with staff, and that he threatened to escape punishment by lying · Culver City Police Officer revealed that the 1998 murder-for-hire suspect did not go to prison because he was never prosecuted – that the informant's did not provide enough information for a

far as he knew the suspect never went to prison. · Informant admitted to driving without a license, and to applying for a duplicate license even though he did not have a current valid one. · Informant claimed that defense counsel's interview placed him at risk, but then admitted he was not "intimidated" and that the relocation was only for a short time. · Informant admitted generally that he had told lies in the past to obtain benefits, but not as to specific instances. •	prosecution, and that in fact the informant's information had **never** led to a prosecution in that office. · LAPD's own records revealed that informant had first worked for the LAPD as early as 1984. · Informant was arrested on a new charge in 2006; he offered to testify falsely in order to receive a benefit in his carjacking case.

II. LEGAL STANDARD

"Federal courts have inherent but limited supervisory powers to formulate procedural rules." United States v. Ross, 372 F.3d 1097, 1109 (9th Cir. 2004) (internal quotation marks omitted), on r'hg in part on other grounds, 138 F. App'x 902 (9th Cir. 2005). District courts "may exercise [their] supervisory powers . . . in response to outrageous government conduct that falls short of a due process violations." Id. This power "may be used to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself." Id. at 1109-10 (internal quotation marks omitted). In order to "justify exercise of the court's supervisory powers, prosecutorial misconduct must (1) be flagrant and (2) cause substantial prejudice to the defendant." Id. (internal quotation marks omitted). Substantial prejudice occurs where "the government conduct had at least some impact on the verdict and thus redounded to the

defendant's prejudice." Id. (internal quotation marks and alterations omitted).

III. CONCLUSIONS OF LAW

The Court finds that the Government's conduct in this case requires that Defendant be afforded a new trial.[3]

A. The Government's Conduct Was Flagrant

The Government's failure to investigate and disclose impeachment information constituted flagrant misconduct. See United States v. Chapman, --- F.3d ----, 2008 WL 1946744, at *10 (9th Cir. May 6, 2008) (holding that failure to disclose exculpatory and impeachment information as required by the Constitution may constitute flagrant misconduct).

"The prosecution is obligated by the requirements of due process to disclose material exculpatory evidence on its own motion, without request." Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) (citing Kyles v. Whitley, 514 U.S. 419, 432-34 (1995)). "Material evidence required to be disclosed includes evidence bearing on the credibility of government witnesses." Id. While, post-trial, a court will not reverse a conviction for a Brady violation unless the undisclosed evidence undermines confidence in the verdict, that is not the standard prosecutors are obligated to consider pre-trial; rather, pre-trial a prosecutor is obligated to disclose all evidence "which relates to guilt or

[2] For this reason, the Court need not address Defendant's alternative argument that he should be granted a new trial based upon violations of Brady v. Maryland, 373 U.S. 83 (1963).

punishment, and which tends to help the defense by either bolstering the defense's case or impeaching prosecution witnesses." United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) (internal citations omitted). "[W]here doubt exists as to the usefulness of evidence," the Government "should resolve such doubts in favor of full disclosure." Id. (internal quotation marks omitted). The Government's disclosure obligations extend beyond information in the prosecutor's hands; indeed, "the prosecution has a duty to learn of any exculpatory material known to others acting on the government's behalf." Carriger, 132 F.3d at 479-80.

In this case, the Government violated its investigation and disclosure duties. There can be no doubt that the Government in this case was aware of its obligations. Defense counsel made numerous specific requests seeking information; more importantly, the Court made abundantly clear that it was concerned that the Government had not sufficiently complied with its Brady obligations, and that "you [the Government] have more than an obligation to simply learn things third-hand. You have – if you are dealing with an informant, you have an obligation to affirmatively find out information that relates to that informant that you can reasonably acquire." (Mot. To Dismiss, Ex. O, at 125-26.) There is therefore no basis for the Government to contend that somehow it was not aware of the requirement to disclose impeachment information relating to its witnesses, that it had an affirmative duty to discover that information, and that it could not merely rely on the LAPD to relay that information third-hand.

The Ninth Circuit has recently emphasized as "particularly relevant" to a finding of flagrant misconduct "the fact that the government received several indications, both before and during trial, that there were problems with its discovery production and did nothing to ensure it had provided full disclosure." Chapman, 2008 WL 1946744, at *9. Here, despite explicit warnings from the Court, the Government failed to make even basic inquiries about the credibility of its primary witnesses. To name just a few examples: Instead of requesting the disciplinary reports about the LAPD police witnesses, the Government claimed it was not "aware" of any impeachment because it did not possess those reports. Even though it knew the informant had a lengthy criminal record, instead of requesting his DOC file the Government represented that "There is no impeachment information . . . other than what has already been provided to you." Even when it discovered that the informant had informed in a 1998 murder-for-hire case, the Government neglected to speak with any of the officers involved, instead relying on the informant's – false – claim that he was reliable because although he showed up to court, he was not called to testify.

The Government represented that the informant had no drug or medical problems that would bear on his testimony. It was not difficult to ascertain that the informant was at that time in drug treatment, his DOC file documented a lengthy history of drug abuse, and a simple question from defense counsel revealed the informant's eye problems. All these issues could affect the reliability of an informant's eyewitness identification, and yet the Government

represented, without any meaningful investigation, that the informant had "no" such problems.

Similarly, the Government initially represented that the informant began testifying in 2004. Even when the prosecution realized he had a history of informing since at least 1976, it failed to investigate further, instead representing to the Court that the 1976 incident was isolated. (See Mot. To Dismiss, Ex. O, at 136.) Of course, had the Government investigated the informant's history by, for example, requesting his DOC file, it would have known that law enforcement officials were well aware that this informant had a well-documented and lengthy history as an informant who attempted to manipulate officials and was willing to lie to help himself. (Id., Ex. X.)

In fact, evidence of the informant's lengthy history was even more obvious. As the Government now acknowledges, the LAPD's own records of using this informant date back to 1984. The Government contends it was not aware of this fact, and submits declarations by several LAPD officers stating that at the time of Mr. Hector's two trials they were not aware of these records or of the informant's pre-2004 history with the LAPD. Yet, when counsel for the Government reviewed the informant's LAPD file with LAPD officers on April 10, 2008, the 1984 records were present and in the file.

At the April 28, 2008 hearing on this motion, government counsel blamed her experience for her failure to discover and disclose this material earlier. The Court does not disagree with this characterization. However, it does not change the material

facts that have led to this current situation: The Government relied upon the LAPD for all information without conducting any follow-up investigation despite a Court order to take a more affirmative role in the investigation. As is shown by the example of the 1984 records, when government counsel conducted an **active** investigation, important records immediately bubbled to the surface. Yet, in direct violation of the Court's orders, the Government persistently maintained it had no impeachment information without making the necessary underlying inquiries. As such, the Government's conduct, even if unintentional, nonetheless constituted "reckless disregard for [its] constitutional obligations." United States v. Chapman, --- F.3d ----, 2008 WL 1946744, at *9 (9th Cir. May 6, 2008) (holding that "reckless disregard" for obligations constituted flagrant misconduct where the Government failed to produce Brady material while "repeatedly represent[ing] to the Court that [it] had fully complied with *Brady* and *Giglio*, when [it] knew full well that it could not verify these claims," even if "the documents themselves were not intentionally withheld from the defense").

The Government attempts to justify its conduct by arguing that it is "'under no obligation to turn over material not under its control,' which includes Department of Corrections files and state law enforcement personnel files." (Opp'n 17 (quoting United States v. Dominguez-Villa, 954 F.2d 562, 565-66 (9th Cir. 1992); United v. Aichele, 941 F.2d 761 (9th Cir. 1991)). This argument is unavailing. Dominguez-Villa and Aichele were Ninth Circuit cases issued before the Supreme Court made clear that willful blindness

is not enough; "the individual prosecutor has a duty **to learn** of any favorable evidence known to others acting on the government's behalf in the case, **including the police**." Kyles, 514 U.S. at 437 (emphasis added). The Ninth Circuit has recognized this requirement, noting that "[b]ecause the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned."[4] Carriger, 132 F.3d at 480.

In fact, the Ninth Circuit has specifically held that when the prosecution

> decides to rely on the testimony of such a witness, it is the [prosecution's] obligation to turn over all information bearing on that witness's credibility. This must include the witness's criminal record, including prison records, and any information therein which bears on credibility. The [prosecution] had an obligation, before putting [the informant] on the stand, to obtain and review [his] corrections files, and to treat its contents in accordance with the requirements of Brady and Giglio.

Id. (internal citations omitted).[5]

In some instances, the federal government may not be responsible for material under the exclusive control of state officials because state law enforcement may not be acting as the agents of the federal government. However, in this case, the

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[4] In other words, to the extent that pre-Kyles Ninth Circuit law focused on whether the information was in the "possession" of the government, see, e.g., United States v. Santiago, 46 F.3d 885, 893-94 (9th Cir. 1995), that proposition has been supplanted by Kyles's prescription that the Government has a duty to learn of any exculpatory material known by others acting on the Government's behalf.

[5] The Government attempts to distinguish Carriger by arguing that in this case Defendant was able to impeach the informant even without the DOC file, (Opp'n 16), but that question goes to prejudice, not to the prosecution's initial obligation of investigation and disclosure.

federal government relied completely on state officers to investigate and present the case, depended solely on state officers to vet its witnesses, and used state police officers' testimony to vouch for the credibility of its informant before the jury. For example, when the issue of whether the Government had made sufficient inquiries regarding impeachment evidence about its witnesses, the Government acknowledged that the LAPD had been its entire source of information about the informant:

> **THE COURT:** Who made the inquiries concerning this informant. Is this an L.A.P.D. informant?
>
> **THE GOVERNMENT:** Yes, it is, Your Honor.
>
> **THE COURT:** What reasonable inquiries were made concerning the background and the services of the informant, and by whom?
>
> **THE GOVERNMENT** Your Honor, the L.A.P.D. Officers who handled the informant, they have whatever records of payments to the informant, and I believe that is what they used to determine –

(Mot. To Dismiss, Ex. O, at 122.)

> **THE COURT:** Did you ask him about his history of working as an informant?
>
> **THE GOVERNMENT:** No. I asked the L.A.P.D. officers about that.
>
> **THE COURT:** But you briefed the informant, and you did not ask him about his history of working as an informant, is that correct?
>
> **THE GOVERNMENT:** Your Honor, that was a really short conference that we had that day.[6]

[6] The Government thus does appear to have met with the informant once, for this "really short conference." It is unclear what exactly transpired, because government counsel represented both that she did not herself ask the informant about his history of informing, (id. at 123 ("No. I asked the L.A.P.D. officers about that"), and that she did so ask him, (id. at 136 ("[W]e asked the informant about his prior informing . . . We meaning I".). This inconsistency may perhaps be chalked up to the nerves or inexperience of the government counsel. Regardless, however, there is no dispute that this conference with the informant was "really short" and that it did not occur until after the first mistrial. Further, it is undisputed that the Government took no action to

(continued...)

(Id. at 123.)

> **THE COURT:** Did anybody ask the L.A.P.D. for any records concerning the informant?
>
> **THE GOVERNMENT:** We do have the records of payment sheets, Your Honor, and those were turned over to the defense.
>
> **THE COURT:** Did you ask the L.A.P.D. to look for records prior to 2004?
>
> **THE GOVERNMENT**: The L.A.P.D. told me that they only had records of 2004.
>
> **THE COURT:** Who at the L.A.P.D. told you that? Was it one of the people that are witnesses in this case or someone else?
>
> **THE GOVERNMENT:** It may have been Officer Fletcher, but I don't remember who it was.

(Id. at 127.)

Under these circumstances, where the Government placed sole responsibility for vetting the informant with the LAPD, the Government had a responsibility to determine what information the LAPD had accumulated and whether that information was accurate. Any other conclusion would be tantamount to a ruling that the Government could evade its disclosure responsibilities by delegating investigative duties to state officials and then declining to ask those state officials – who had **all** the relevant information - what they had discovered.

Further, the Court is by no means imputing state knowledge to federal officials. In this case, the Court explicitly expressed concern about whether Brady obligations were being fulfilled, and ordered the Government to investigate the informant independently,

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[6](...continued)
corroborate any of the informant's representations. Therefore, for all practical purposes, the Government relied entirely on the LAPD.

and not to rely solely on information passed through the LAPD, especially when the LAPD source was known to be unreliable:

> When I deal with the federal government and prosecutorial agencies I [need to] feel like there has been due diligence on the Brady issue. I am not feeling comfortable about it now in this case. . . . You [the Government] relied perhaps on the L.A.P.D. for this information. There seems to be a gross discrepancy.

(Id. at 125.)

> But if you [the Government] make a decision to call him [the informant] the problem is still whether his history as an informant was not appropriately disclosed through – you know, again through either not asking the questions correctly or, you know, the answers being filtered in some way by . . . Officer Fletcher.

(Id. at 133.)

The question before the Court is therefore not whether the Government should have independently realized that it could not rely solely on LAPD representations. The question is not whether the Government can ever, under some hypothetical set of circumstances, rely on the LAPD's representations. The point, rather, is about the circumstances of this case. The point, rather, is that the Government - persistently and recklessly - failed to conduct a reasonable investigation of its informant **even after** 1) direct questioning from defense counsel; and 2) explicit orders from the Court.

The Court finds that the Government's entire investigation of the informant can be summarized as follows:

- Pulled and disclosed the informant's rap sheet with all identifying information, including aliases, redacted

- Relied on the LAPD to provide all impeachment information about the informant. The Government **cannot remember or is refusing to disclose** the identity of the LAPD officer(s) who served as the source for this information, but it "may have been Officer Fletcher," who, as has been discussed, has his own significant credibility problems.

- Had one "really short conference" with the informant that did not occur until after the first mistrial, and took no follow-up action to corroborate any of the informant's representations.

The Court finds that instead of conducting its own affirmative investigation, the Government has consistently acted in an entirely defensive or responsive manner, relying completely on the information provided by the LAPD. Then, riding on the coattails of defense counsel's work, whenever defense counsel has discovered additional or different information on her own, the Government has adopted that information and asserted that **now** there is no more impeachment. Such a response does not constitute compliance with the Court's orders, but is rather a passive attempt to insist, without actually investigating, that the totality of impeachment is whatever has already been revealed. Such reckless behavior cannot be condoned because it invites a failure to discover and disclose crucial evidence that the defense has a constitutional right to review.

Further convincing the Court that the Government violated Court orders is that fact that it has failed to disclose

information directly in its possession. Even after defense counsel subpoenaed Officer Fletcher's disciplinary reports, which were delivered to both the Government and defense counsel, and which documented a sustained complaint against Officer Fletcher for reporting inaccurate information, the Government nonetheless represented to the Court it was not aware of any sustained complaints.[7]

The failure to identify and disclose the impeachment evidence against Officer Fletcher is particularly important because Officer Fletcher was an important source – possible the most important source – of information about the informant. Accordingly, the Government's recklessness as to the gathering of information regarding Officer Fletcher's credibility bleeds into its

[7] In a motion in limine "to exclude evidence of complaints filed against LAPD Officers," the Government represented that "there do not appear to be any sustained complaints against any of the officers relating to their credibility." (Mot. In Limine 1.) The Government argues that "the point of that particular motion" was to "preclude any unsustained complaints." (Tr. Hearing Apr. 28, 2008, at 30:5-8.) It is true that the motion does conclude with the Government's request to "preclude defendant from introducing any evidence of any complaints against the officers in this case other than sustained complaints relating to dishonesty." (Mot. In Limine 4.) Regardless of whether the motion was aimed at sustained or unsustained complaints, however, the Government nevertheless represented that "The Government is aware that the defendant has subpoenaed documents from the officers' personnel files in this case. However, the government is not aware of any sustained complaints involving dishonesty against any of the officers." (Id. at 3.) This representation is misleading because the **Government**, as well as defense counsel, had received the personnel files by this point. (See Tr. at 30:13-14.) Thus, once again, the Government made representations without having performed the necessary underlying investigation, and those representations proved inaccurate. In this particular instance, government counsel did not even take the minimal steps of reviewing the documents **in her own possession** before making baseless representations to the Court. Government counsel's inexperience may well have caused this reckless behavior; the effect nonetheless is that the Court cannot credit the accuracy of the Government's representations in this case.

recklessness as to the gathering of information regarding the informant.

The Government argues that the conduct in this case is less severe than that in other cases in which the Ninth Circuit has declined to find egregious conduct. (Opp'n 11.) Those cases are distinguishable. Most importantly, none involve a situation where the Government failed to comply with express court orders to investigate and provided false answers to specific questions regarding an informant. Cf. United States v. Bernal-Obeso, 989 F.2d 331, 337 (9th Cir. 1993) (remanding for evidentiary hearing on governmental misconduct in failing to discharge Brady obligations and leaving open the possibility of ordering a new trial or "of dismissing the indictment" should the court "uncover egregious wrongdoing by the government").

Further, most of the cases relied upon by the Government involve the claim that outrageous government conduct violated a defendant's **due process** rights. See, e.g., United States v. Gurolla, 333 F.3d 944, 950 (9th Cir. 2003); United States v. Matta-Ballesteros, 71 F.3d 754, 762-64 (9th Cir. 1996) (as amended); United States v. Montoya, 45 F.3d 1286, 1300 (9th Cir. 1995); United States v. Simpson, 813 F.2d 1462, 1464-65 (9th Cir. 1987). The standard for establishing a due process violation based on outrageous government conduct is indeed high; the "defense . . . is limited to extreme cases in which the government's conduct violates fundamental fairness and is shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment." Gurolla, 333 F.3d at 950 (internal quotation marks omitted).

However, Mr. Hector is not alleging that his due process rights were violated. He seeks a remedy through this Court's supervisory power to prevent the Government from reaping benefits from misconduct that "falls short of a due process violation," and that standard, as discussed, requires only that the misconduct be "flagrant" and that the misconduct have "some impact" on the verdict. Ross, 372 F.3d at 1109-10 (internal quotation marks omitted). As relevant here, the use of supervisory powers "is an appropriate means of policing ethical misconduct by prosecutors." United States v. Lopez, 4 F.3d 1455, 1463 (9th Cir. 1993).

United States v. Alvarez, 317 F. Supp. 2d 1163, 1164 (C.D. Cal. 2004), is instructive. In that case, the defendants were charged with methamphetamine offenses. In response to defendants' requests for discovery regarding any and all informants, the Government responded that there was only one informant and that there was no impeachment information for that informant. Id. at 1164. The Government had advised the defense that the single informant had worked only for the Drug Enforcement Agency ("DEA") and no other agency, and that he had not worked outside the state of California. Id. All this information proved incorrect. Further, the Government failed to disclose that there was a "sub-informant" who worked under the informant. Id. at 1165-66. When the defense brought this information to the court's attention, the court ordered full disclosure of this impeachment material, but the Government filed a notice of non-compliance. Id. at 1165.

The court found prejudice, emphasizing that "[a] law enforcement agency must not be allowed to shield itself from

accountability by hiring someone outside of law enforcement who is free to violate citizens' rights." Id. at 1167. The court reasoned:

> Either the Government did not know about the use and assistance of the sub-informant . . ., or the Government deliberately lied to the defense in this case.
>
> If the Government did not know about the existence and utilization of the sub-informant, then its ability to monitor, regulate, and control the actions of its [informants] is seriously compromised. If the Government did know about the sub-informant, but deliberately withheld this information from the defense, that is an even greater evil.
>
> ****
>
> Representations made by the Government in this case concerning the history and lack of impeaching material concerning the [informant] simply cannot be relied on by the defense or this Court.
>
> By using an intermediary to do the actual work . . ., the DEA attempts to insulate itself from inspection and examination and from any charges of improper conduct.
>
> ****
>
> Defendants are entitled to discovery which will provide them with reliable information about the background, credibility, record, and prior activities of an [informant] used by the Government in a case where information provided in discovery is proven to be wrong. . . .

Id. at 1166-67.

As in Alvarez, the Government in this case - even if unintentionally - has effectively used an intermediary "to insulate itself from inspection and examination and from any charges of improper conduct." Here, that intermediary was the LAPD. The Court finds, therefore, that the Government has committed flagrant misconduct by refusing to investigate its witnesses in violation direct Court orders and its Brady obligations.

B. The Government's Conduct Redounded to the Defendant's Prejudice

Once egregious government conduct has been established, the prejudice standard is low; Defendant must show only that the Government's flagrant conduct had "at least some impact on the verdict." Ross, 372 F.3d at 1110 (internal quotation marks omitted). This prejudice standard is "a less stringent standard than the Brady materiality standard," id., which requires a showing that the "suppressed evidence would have created a 'reasonable probability' of a different result," United States v. Jernigan, 492 F.3d 1050, 1053-54 (9th Cir. 2007) (en banc) (internal quotation marks omitted). A 'reasonable probability' of a different result does not mean that a defendant would more likely than not have received a different verdict; "[i]nstead, [a defendant] must show only that the government's evidentiary suppression undermines confidence in the outcome of the trial." Id. (internal quotation marks omitted). Because the standard for egregious government conduct is lower than that required to show prejudice under Brady, Mr. Hector does not even need to demonstrate that the misconduct undermines confidence in the trial. Any impact on the trial at all will suffice. Under the circumstances in this case, Mr. Hector has met his burden.

The Government's primary argument for why the defendant has not suffered any prejudice is that defense counsel was able to discover much of the impeachment evidence in time to present it at trial, and any impeachment disclosed post-trial would have been cumulative. Put another way, the Government contends that defense counsel through her own efforts was able sufficiently to impeach the informant such that the extra evidence would have had no

impact on the verdict.

The Court disagrees. As a preliminary matter, the Court notes that the Ninth Circuit has emphasized that "the government cannot satisfy its *Brady* obligation to disclose exculpatory evidence by making some evidence available and claiming the rest would be cumulative. Rather, the government is obligated to disclose *all* material information casting a shadow on a government witness's credibility." Carriger, 132 F.3d at 481-82 (internal citations omitted). Therefore, the fact that impeachment information may ultimately prove cumulative does not excuse the Government from investigating and disclosing it.

More importantly, in this case important information was not revealed during trial. Defense counsel was able to elicit that the informant had a criminal history, had been an informant in the past, had vision problems, and had, generally, "told lies in the past to get benefits." (Mot. To Dismiss, Ex. P, at 250.) The jury missed crucial points, however. For example, the jury did not learn of the information contained in the DOC records, which revealed that California authorities had known him for decades to be a "snitch jacket," and an informant who threatened to beat the system "by lying." (Id., Ex. X, at 420-21, 532.) Similarly, the jury did not hear from Lieutenant Chris Gutierrez of the Culver City Police Department, who was involved in the 1998 murder-for-hire case for which the informant provided information. Lieutenant Gutierrez would have testified that contrary to the informant's contention that he had shown up to court but was not called to testify, in fact the suspect had never been prosecuted

because the informant had provided insufficient information. (Chen Decl. ¶ 39.) Indeed, Gutierrez would have testified that none of the information the informant provided to the Culver City Police **ever** led to any prosecution because there was "not enough information to prosecute," and that the informant knew how to "play both sides" of the system. (Id.)

This information is important evidence that local authorities viewed the informant with skepticism because he was known to manipulate the system and to lie to help himself, and because his information, at least with respect to one department for which he informed, had never led to any prosecutions. Hearing that an informant has a criminal record or has lied in the past about nonspecific events is different in kind from hearing that law enforcement officials themselves had for decades considered the informant to be a manipulative individual with a pattern of lying to serve his own interests. Defense counsel exerted great effort at trial attempting to paint the informant as a liar by showing he had lied regarding such relatively trivial matters as DMV application forms. Biting impeachment material such as the DOC report and Lt. Gutierrez's comments would have allowed defense counsel to attack the informant's credibility much more efficiently and effectively.

The Government argues that because the informant was never painted as an angel, this extra information would have made no difference. Yet, when at trial defense counsel tried to argue that the informant was unreliable using the impeachment that she did have, (see Tr. at 606-08), the Government in closing argument

explained away the informant's questionable credibility by relying on Officer Fletcher's – who, as has been discussed, had a sustained complaint against him for inaccuracy – testimony that this informant had always been reliable, (Mot. To Dismiss, Ex. V, at 337.). The Government therefore urged the jury that while the informant might have lied in the past, "all this talk that he is unreliable . . . is just exaggeration." (Id.)

In other words, the Government itself obviously appreciated the pivotal nature of the informant's credibility because it urged in closing argument that although the informant was not perfect, he had consistently been a reliable source for the Government, and was telling the truth in this case. (Id. at 340); see Carriger, 132 F.3d at 482 (holding that the defendant had suffered prejudice from a Brady violation where the prosecutor had "vouch[ed] for [the informant's] truthfulness in closing argument"). Defense evidence that government officials had in fact known him to be manipulative and unreliable could have severely undermined the Government's argument. Without this information, the jury might have chalked the informant's unreliability up to a few isolated incidents. With the evidence, it reads much more like a pattern.

The Government's misconduct and apparent indifference to the Court's orders are particularly significant, and the prejudice particularly apparent, because this case was so simple. This case was comprised almost entirely of circumstantial evidence, and Defendant had an explanation for everything: The money belonged to his friend, Jordan Berhe, and she corroborated this at trial. The culprit was his missing roommate, and despite the Government's

skepticism as to the viability of this defense, Mr. Hector's apartment manager confirmed the roommate's existence at trial. Therefore, the informant - as the only direct evidence tying Defendant Hector to the crime – was a crucial witness.

Given the Government's misconduct in consistently - and in flagrant violation of Court orders - refusing to investigate the background of its witnesses, Defendant need only show some impact on the verdict. The Court is convinced that had the jury heard that other law enforcement officials had in fact long considered the informant to be manipulative and willing to lie, it would have been less likely to believe him.

C. Remedy

Although the Court, with its busy docket, wishes this were not the case, it has concluded that the most effective remedy for the government's misconduct is to grant a new trial.

This case has a troubled history. The LAPD's lead investigator caused a mistrial by responding to a government question in a manner not only non-responsive, but essentially guaranteed to result in a mistrial. The Court will never know whether Officer Fletcher intended to cause a mistrial, whether he hoped to prejudice the jury with inadmissible evidence, or whether he had an inadvertent "lapse" in judgment. Regardless, this conduct was of a kind that the Court has never - before then or since - experienced with any other law enforcement officer.

This case was then set for a second trial. Brady issues were raised and raised again. The Court held several hearings. The

Government made representations that suggested it had not been complying with its affirmative duties to seek out impeachment information in a diligent fashion. The Court was therefore placed in the position of having to explain to the Government that its Brady responsibilities transcend superficial inquiry.

There appears to have been - and may still be - a disconnect between the Court's orders and the Government's appreciation of the seriousness of its duties under Brady. The Government should not be taking a "no harm, no foul" approach to Brady; that is, it should not be making the argument that defense counsel was able to discover through expense and diligence most of the Brady material anyway. The Court should not have to order the Government to fulfill its constitutional obligations at all, much less repeatedly and without faith that the orders will be followed. Indeed, for the sake of the integrity of our system of justice, courts must depend on the Government's compliance with their orders.

The Court seriously considered dismissing the indictment. The Government has taken the position it had no obligation to investigate what state law enforcement knew about the informant. Given a situation where, as in Alvarez, "information provided in discovery is proven to be wrong," see 317 F. Supp. 2d at 1167, and where the information has only been corrected to the extent that defense counsel's own investigation has revealed error, the Court

has lost confidence that the Government in this case even now has complied with its full investigation and disclosure obligations.[8]

For example, defense counsel has already uncovered a 2006 interview of the informant by the police in which the informant offered to "tell a whole different story" in court if it would help him. (Mot. To Dismiss, Ex. S, at 309.) While this event occurred after Mr. Hector's trial, the Court is concerned that the informant may have made other comments that similarly undermine his credibility but that have not yet been discovered due to the Government's persistent failure to investigate. See Bernal-Obeso, 989 F.2d at 333-34 ("By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.").

Similarly, the Government represented that the LAPD records showed that the informant began informing in 2004. Now, the Government acknowledges that those records in fact date back 1984. The Court is concerned that additional records of the informant's substantial informing activities, whether in the possession of the LAPD or other law enforcement departments, that contain

[8] The comments here are not directed to typical government conduct. In this Court's experience, the Government takes its Brady obligations seriously. It is not unusual for the prosecution to err on the side of completeness or to ask the Court to review, in camera, material that may arguably be exculpatory under Brady. The Court therefore regards this case as an unfortunate aberration.

substantial additional impeachment material, may yet remain undisclosed.

In short, the Court repeatedly made clear to the Government that it needed to conduct a more probing inquiry into its witnesses because the investigation to that point had been unsatisfactory. Instead of following this directive, the Government recklessly continued to rely entirely on the LAPD's affirmative representations and wait for defense counsel to discover additional material. Government counsel asserts that any failings result from her inexperience, and the Court is willing to accept that contention. Nevertheless, as the impeachment material discovered by defense counsel piled up, the Government should have quickly realized that it was failing to engage in the type of genuine, diligent inquiry that this Court ordered and that, indeed, is required by law.

However, the Court is cognizant of the fact that dismissal of the indictment is an "extreme remedy" that is only justified where "no lesser sanction could adequately preserve judicial integrity and deter future governmental misconduct." Lopez, 4 F.3d at 1463-64. The Court believes that a new trial where the defense may introduce all additional evidence regarding the informant, and where the Government will conduct a more thorough investigation, will suffice as a sanction. See United States v. de Cruz, 82 F.3d 856, 867-68 (9th Cir. 1996) (observing that a new trial may be a remedy for outrageous government conduct).

The Court emphasizes that the Government's credibility in this case has been compromised. The Court expects that the Government will fully comply with the law and the spirit of Brady concerning the informant and any other witnesses it plans to use on retrial. It will **not** be sufficient for the Government to assert that all impeachment material "that it is aware of" has already been disclosed. The Government must independently research this (and any other) informant.

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III. CONCLUSION

Based on the foregoing analysis, the Court hereby DENIES Defendant Hector's motion to dismiss the indictment, but GRANTS his request for a new trial.

IT IS SO ORDERED.

Dated: May 8, 2008

DEAN D. PREGERSON
United States District Judge